Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ROBERTSON-CECO CORP.,

Cross-Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the majority below err in failing to limit the time period during which the district court should examine a defendant's contacts with the forum to the year during which suit was filed?

INTERESTED PARTIES

The Petitioner is Metropolitan Life Insurance Company.

The Respondent/Cross-Petitioner is Robertson-Ceco Corporation.

United Dominion Industries, Inc. was dismissed by summary judgment on March 4, 1995, and was not a party to the appeal below, nor is it an interested party to these proceedings.

There is no parent company to the Respondent/Cross-Petitioner and other than wholly owned subsidiaries, it has no subsidiaries.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Respondent requests the Court to grant its conditional cross-petition for a writ of certiorari if it grants the Petitioner's request for a writ. The opinions below and statement of the case are set out in Respondent's Brief in Opposition. (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix A to the Petition.)

JURISDICTION

The court of appeals entered its judgment on May 22, 1996. (App. 1a.) The jurisdiction of this Court is invoked in the Petition For A Writ Of Certiorari under 28 U.S.C. § 1254(1). The Petition For A Writ Of Certiorari was placed on the docket on August 22, 1996. Respondent expressly relies on Supreme Court Rule 12.5 in filing this Conditional Cross-Petition For A Writ Of Certiorari.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. CERTIORARI SHOULD BE GRANTED TO PROVIDE GUIDANCE AS TO THE PROPER TIME PERIOD FOR ASSESSMENT OF DEFENDANT'S CONTACTS WITH THE FORUM STATE IN THE MINIMUM CONTACTS ANALYSIS OF ANY *IN PERSONAM* JURISDICTION INQUIRY

Certiorari should be granted because the opinion below failed to limit the period during which it assessed

Robertson's contacts with Vermont to the year the plaintiff filed suit in violation of due process limitations on the exercise of personal jurisdiction over the defendant. The opinion below held:

> In general jurisdiction cases, district courts should examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances – up to and including the date the suit was filed – to assess whether they satisfy the "continuous and systematic" standard. The determination of what period is reasonable in the context of each case should be left to the court's discretion.[1]

App. 15a-16a.

The majority observed that few cases specifically discuss the appropriate time period for assessing whether a defendant's contacts with the forum state are sufficient for the purposes of exercising jurisdiction. The majority went on to consider that this Court looked at a seven-year period in *Helicopteros* and other circuit courts have likewise considered multi-year periods for assessing minimum contacts. None of those cases, however, specifically analyzed the appropriate time period for the jurisdictional inquiry of minimum contacts. Because this Court's

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[1] Having announced this rule, the court improperly reverses the trial judge because it failed to find that he abused his discretion in limiting the minimum contacts inquiry to the year 1993. Thus, alternatively, certiorari should be granted to provide direction on the appropriate analysis of the minimum contacts time period as a matter left to the discretion of the trial judge or tied to some other consideration calculated to make sure that due process fairness owed a defendant is met.

opinions are silent on the subject and it affects substantial due process rights of a defendant, certiorari should be granted.

This Court's analysis of a defendant's minimum contacts with the forum state is intimately tied to the notion that defendants may purposefully structure those contacts so as to create or frustrate jurisdiction. In *Asahi Metal Industry Co., Ltd. v. Superior Court of California* this Court held "[t]he 'substantial connection,' . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by **an action of the defendant purposefully directed toward the forum state.**" 480 U.S. 102, 112 (1987). (Emphasis in original), (citations omitted). See also *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("when a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumer, or if the risks are too great, severing its connection with the State").

This Court also has recognized that the due process clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that contact will and will not render them liable to suit . . . " *Id.* This Court also has suggested that "foreseeability" is relevant to due process protections of a defendant in a jurisdictional analysis: "t[h]e foreseeability that is critical to the due process analysis . . . is that the defendant's conduct in connection with the forum State is such that he should reasonably anticipate being haled into court there." *Id.* See also *Hanson v. Denkla*, 357 U.S.

235, 253 (1958) (" . . . it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws.")

The foregoing cases demonstrate this Court's recognition that a defendant's contacts with a forum must be intentional and form the basis for orderly planning around potential liability. Implicit to this analysis has to be the recognition that a defendant, over time, may change its conduct in response to those concerns about potential liability. Likewise, the constitutional limits of the exercise of *in personam* over such a defendant would change, over time, as the defendant's conduct with respect to the forum changed. Accordingly, a year period during which suit is filed is the appropriate period for minimum contacts to be assessed or else the burden on the defendant, the central due process concern in all personal jurisdiction cases, may become intolerable.

For example, a California corporation which maintains a branch office in Vermont faces much less burden in defending a suit in Vermont than it would after it had closed its office and left the state entirely or substantially reduced its contacts with the state. The corporation which, as a matter of avoiding potential liability, tailors its business plan to eradicate or limit its contacts with a state is entitled to the 'predictability' and 'reasonable foreseeability' of exposure to litigation in a foreign jurisdiction that this Court repeatedly notes in its jurisdictional analysis. Especially with regard to 'general' jurisdiction exposure, this Court needs to clarify the rule as to the time period during which minimum contacts may be assessed or else the most important function of

that test – that the absence of minimum contacts forecloses the jurisdiction analysis prior to any reasonableness inquiry – will be lost to jurisdictional analysis and to a defendant's ability to control its liability exposure.

Although the coincidental or intentional absence of a defendant from a state both serve to limit if not eradicate the defendant's contacts with the state, neither situation is appropriate to the exercise of jurisdiction since there are no minimum contacts. For the defendant which intentionally or unintentionally substantially withdraws from contacts with a state, it is equally predictable that it should not reasonably anticipate being haled into court there, after all, it has no contacts with the state. Thus, this Court must grant certiorari to offer guidance to the circuit courts on the appropriate time period during which a defendant's contacts with a forum state should be considered. The fundamental fairness to defendants protected by the due process clause is implicated in a case such as this where a defendant's year to year contacts with a forum vary widely thus leaving some years where the anticipation of being called to suit is reasonable and other years where it is not.

CONCLUSION

For the foregoing reasons, the Conditional Cross-Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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v.
METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the majority below err in failing to limit the time period during which the district court should examine a defendant's contacts with the forum to the year during which suit was filed?

PARTIES TO THE PROCEEDINGS

The original parties to this lawsuit included: (1) Metropolitan Life Insurance Company; (2) Robertson-Ceco Corp.; and (3) United Dominion Industries, Inc. Summary judgment was granted in favor of United Dominion on March 14, 1995. It was not a party to the appeal below, nor is it an interested party here.

There is no parent company of the respondent. Respondent's subsidiaries (other than wholly owned subsidiaries) are these:

Blodgett Holdings, Inc.
Briggs Holdings, Inc.
Briggs Plumbing Products, Inc.
Cicero/Cermak Corporation
Cloverleaf Properties, Inc.
Coating Technologies International, Inc.
Dan River, Inc.
Frialator International, Limited
Genesis Seguros Generales, Sociedad Anonima
De Seguros Y Reaseguros
GS Blodgett Corporation
GS Blodgett Inc.
GS Blodgett International LTD.
Kolon-Met Life Insurance Company
Magikitch'N, Inc.
Metropolitan Lloyds Insurance Company of Texas
Metropolitan Structures
Metropolitan Structures, Inc.
Metropolitan Structures West, Inc.
Morguard Investments Limited

MS Management Services, L.P.
Pitco Frialator, Inc.
Santander Met, S.A. (Mexico)
Seguros Genenis, S.A. (Spain)
State Street Research Portfolios, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Metropolitan Life Insurance Company requests that the Court deny Robertson-Ceco Corporation's conditional cross petition seeking review of an opinion of the Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Court of Appeal's opinion is reported at 84 F.3d 560 and reproduced in the Appendix to Metlife's Petition for a Writ of Certiorari (case no. 96-306), at 1a - 35a. The opinions of the district court are unreported and also reproduced in the Appendix of Metlife's Petition at 36a - 47a.

JURISDICTION

The Court of Appeals entered its judgment on May 22, 1996. (App. 1a.), and Metlife's petition was filed (by mail) on August 20, 1996, and placed on the docket on August 22, 1996. Robertson-Ceco's cross-petition was filed on September 23, and placed on the docket September 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

REASONS FOR DENYING THE PETITION

I. The Conditional Cross Petition Meets None Of The Traditionally Recognized Bases For Granting Certiorari

In support of its conditional cross petition, Robertson-Ceco has invoked none of the considerations governing review on certiorari. For instance, with respect to the question it has presented, Robertson-Ceco has identified no

conflict between or among the opinion of the Second Circuit below, and a decision of another United States Court of Appeals, a decision of a state court of last resort, or a relevant decision of this Court. Nor has Robertson-Ceco demonstrated that the Court of Appeals decided an important question of federal law that has not been, but should be, settled by this Court. Robertson-Ceco has also not taken the position that the Court of Appeals departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power. Significantly, Robertson-Ceco has again solely relied on *specific* jurisdiction cases, and then for reasons which are not really apparent. Importantly, however, Robertson-Ceco has not suggested that the courts are having any particular difficulty with the issue it has presented, and that the issue is therefore a sufficiently important one. It therefore appears that none of the criteria of Sup. Ct. R. 10, whether express or implied, have been satisfied, by Robertson-Ceco's protective filing. Robertson simply has not shown any compelling reason why its question presented should be considered by the Court.

II. The Conditional Cross Petition Does, However, Furnish More Support For Granting Metlife's Petition

Robertson-Ceco's position that a period of one year should be used for measuring contacts curiously supports Metlife's position that *general* jurisdiction is the lineal descendant of one of the traditional bases of jurisdiction - corporate presence. Before ***International Shoe***, jurisdiction was traditionally imposed on corporations on a number of bases, including "presence." ***Philadelphia and Reading R.R. v McKibbin***, 243 U.S. 264, 265 (1917)(Mr. Justice Brandeis said, "A foreign corporation is amenable to process

to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such a manner and to such extent as to warrant the inference that it is present there").[1]

That *general* jurisdiction derives historically from "presence" and "doing business" doctrines is supported by the last sentence of the conditional cross petition, where Robertson-Ceco admits, in essence, that there have existed "some years" during which Robertson-Ceco's contacts with Vermont were sufficiently significant that a lawsuit against it in Vermont would have been "reasonable." (Cross Petition, at 5.) The context of Robertson-Ceco's statement is its suggestion that its 1993 contacts, if considered in a vacuum, are insufficient to justify the imposition of *general* jurisdiction. However, since "contacts are commonly assessed over a period of years," as recognized by the Court of Appeals (App. 14a), Robertson-Ceco's admission that its contacts were sufficient during "some years" to make the imposition of jurisdiction "reasonable," validates Metlife's position, not only with respect to the reasonableness of imposing jurisdiction in this case, but more importantly in the sense that continuous and systematic contacts make the imposition of *general* jurisdiction reasonable, without resort to a supervening reasonableness/fairness inquiry, such as that employed by the majority below.

Robertson-Ceco's momentary lapse underscores the confusion that exists relative to the appropriate limits and application of the the concept of *general* jurisdiction. Again, it has been demonstrated, this time by Robertson-Ceco, that

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[1]Very distinguished authorities in other courts adopted this approach. *See, e.g.*, Judge Cardozo's opinion in *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917), which was met with wide approval in other states.

clarification is needed as to whether and to what extent traditional concepts of jurisdiction relative to corporations, survive ***International Shoe***, which furnished a broader base for sustaining jurisdiction than the older doctrines of "presence" and "implied consent."[2]

The court recently addressed a similar issue regarding traditional concepts of jurisdiction as it pertains to individuals in ***Burnham v. Superior Court of California***, 495 U.S. 604 (1990). The court now has the opportunity to complete the analysis begun in ***Burnham***, by addressing whether what were once constitutionally sufficient contacts remain the touchstone for the exercise of general jurisdiction over a corporation, without regard to a supervening and secondary reasonableness / fairness inquiry. Resolution of this issue will promote certainty and predictability in jurisdiction determinations.

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[2]Implicit in ***International Shoe***, is that the Court was not overruling the earlier precedents, but was substituting an appropriate rationale to demonstrate their consistency. While jurisdiction doctrine may have evolved, the criterion ("doing business") remained the same, and the Court did not purport to overrule the multitude of cases which rested on that criterion.

CONCLUSION

Robertson-Ceco's petition for a writ of certiorari should be denied.

Respectfully submitted,

By:_____

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